I.

INTEREST OF THE AMICI CURIAE.

Americans for Effective Law Enforcement, Inc. (AELE), is a national, not-for-profit, non-partisan, non-political organization incorporated under the laws of the State of Illinois. AELE has received a tax exempt ruling from the Internal Revenue Service as an educational corporation. As stated in its by-laws, the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

AELE believes that one of the most effective means of accomplishing these purposes is through the filing of briefs, *amicus curiae*, in cases of crucial significance with regard to the enforcement of the criminal law. In its *amicus* advocacy AELE seeks to represent the concern of the average citizen with the problems of crime and lawlessness in this country and to represent the desire of the vast majority of our citizens for effective law enforcement, commensurate with the protection of the rights of individuals. We further seek to articulate to the courts the very real practical problems which confront law enforcement officers in order that the courts may weigh such problems in deciding cases which will have a vital impact on the effectiveness of the law enforcement process as a whole.

As the 1967 Report of the President's Commission on Law Enforcement and Administration of Justice has pointed out:

> . . . many . . . decisions are made without the needs of law enforcement, and the police policies that are designed to meet those needs, being effectively presented to the court. *If judges are to balance accurately law enforcement needs and human rights, the former must be articulated.* They seldom are. Few legislatures and police administrators have defined in detail how and under what conditions certain police practices are to be used. As a result, the courts often must rely on intuition and common sense in judging what kinds of police action are reasonable or necessary, even though their decisions about the actions of one police officer can restrict police activity in the entire Nation. (Page 94.) (Emphasis added.)

The articulation called for by the President's Commission is what AELE seeks to accomplish.

The International Association of Chiefs of Police, Inc., is a not-for-profit professional association, and represents over 7,000 chiefs and top executives of American police departments and other law enforcement agencies in all 50 states and in 57 foreign countries. The IACP serves the law enforcement profession and the public interest by advancing the art of service. Its aims are to foster police cooperation and the exchange of information and experience among police administrators throughout the world, and to encourage adherence of all police officers to high professional standards of performance and conduct.

The IACP Legal Officers' Section is the only nationally organized body of police legal advisors. They serve as house counsel to 188 law enforcement agencies representing nearly 200,000 police officers and sheriff's deputies in the United States. Most of them are active and participating members of the Section: on April 13, 1973, the Section resolved to adopt the position of the United States in the instant case, and to join this brief in support thereof.

The Metropolitan Police Department of the District of Columbia is the agency principally charged with enforcing the laws of the District of Columbia. The United States Court of Appeals

for the District of Columbia Circuit has jurisdiction over the District of Columbia, therefore its decisions directly affect the Metropolitan Police Department of the District of Columbia. The Metropolitan Police Department of the District of Columbia and its approximately 5000 officers patrol an urban environment of 764,000 residents. Its interests are being represented herein, through its General Council who serves as Legal Advisor to the Department.

II.

OUR REASONS FOR DESIRING TO FILE IN THE INSTANT CASE.

This case raises the very important issue of the permissible scope of a search incident to a lawful custodial traffic arrest. Additionally, the case raises the issues of: (1) the scope of a search which a police officer may lawfully make for his own protection and the protection of others, and (2) of the scope of the Exclusionary Rule in cases such as the instant case. *Amici* will confine our argument to the latter two issues.

The safety of police officers on the street is obviously a matter of the most vital concern to the law enforcement agencies and officers and to those organizations which have a legitimate concern with the effectiveness of law enforcement. *Amici* believe that the decision below, if allowed to stand, will have a direct and deleterious impact upon the ability of police officers to protect themselves in the dangerous situation of a traffic arrest.

Likewise, the Exclusionary Rule, which affects the activities of every law enforcement officer in the United States, is of major concern to those with an interest in the effectiveness of law enforcement. This case presents an opportunity for this Court to examine and to consider narrowing the scope of the Exclusionary Rule, as a matter of the most immediate concern to law enforcement nationwide, and to the law-abiding citizens

who depend upon law enforcement for protection from criminal activity.

Amici therefore respectfully move this court for leave to file this brief.

Respectfully submitted,

FRED E. INBAU, ESQ.
President

ALAN S. GANZ, ESQ.
Secretary-Treasurer

FRANK CARRINGTON, ESQ.
Executive Director
Suite 960
State National Bank Plaza
Evanston, Illinois 60201
Americans for Effective Law Enforcement, Inc.

Of Counsel:

GLEN R. MURPHY, ESQ.
WAYNE W. SCHMIDT, ESQ.
International Association of Chiefs of Police, Inc.
Eleven Firstfield Road
Gaithersburg, Maryland 20760

GEOFFREY M. ALPRIN, ESQ.
General Counsel
Metropolitan Police Department
District of Columbia
Washington, D. C. 20001

SCOTT R. SCHOENFELD, ESQ.
1250 Connecticut Avenue
Washington, D. C. 20036

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-936.

UNITED STATES OF AMERICA,

Petitioner,

vs.

WILLIE ROBINSON, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF AMICI CURIAE IN SUPPORT OF THE PETITIONER OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.; THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC.; AND THE METROPOLITAN POLICE DEPARTMENT OF THE DISTRICT OF COLUMBIA.

INTEREST OF THE AMICI CURIAE.

Our interest has been set forth above at page 2 in our motion to file this brief as *amici curiae*.

SUMMARY OF ARGUMENT.

Amici support the legal arguments made by the petitioner that the search in this case was proper and should be sustained; however, we will not reiterate these arguments herein. *Amici* will confine their arguments to the two issues in this case involving: (1) the safety of the police officer in custodial traffic arrest situations; and, (2) possible modification of the Exclusionary Rule, limiting its applicability to those cases of police misconduct which are wilful and substantial.

The lower court was faced with the question of the extent to which a protective search could be made by police officers making a custodial traffic arrest. The lower court, in a 5-4 plurality opinion, limited the protective search to a *Terry*-type frisk. *Amici* present herein statistical data, in the form of numbers of police officers killed and injured in custodial and traffice arrest situations in recent years, to prove that such situations are indeed highly dangerous police activities.

Amici reject the idea, put forth by the court below, that traffic arrest situations are perhaps the "safest" of police activities.

The lower court rejected the total protection which would be afforded to police officers by a full field search in favor of "substantial" protection which would be afforded by a frisk. *Amici* argue emphatically against the idea of "balancing" the safety of police officers against the minimal invasion of privacy involved in the instant case: the full search of one already in custody for a traffic offense. Our reasoning for this position is based upon our view that the death or injury of a police officer is a matter of major importance in our criminal justice system, not to be lightly cast aside; and that judges sitting in the remote isolation of the courtroom should not impose abstrationist and artificial standards in cases involving the safety of police officers who encounter their dangers at first hand.

Finally, *amici*, in this brief, offer this court concrete examples of actual cases, taken from police files across the nation, in which highly dangerous criminals have managed to conceal on their persons firearms which cursory searches failed to discover. In offering these cases we are attempting to bridge the gap between the realities of police work "on the street" and the necessarily isolated remoteness of the courtroom. Our argument on this issue concludes by urging this Court to reverse the lower court, to affirm the right of the police to make full field searches in custodial traffic arrest situations, and to mandate lower courts to apply realistic standards of judgment to cases in which the safety of police officers is clearly involved.

In the second section of our argument, we argue that the time has come to follow the suggestion made by Mr. Chief Justice Burger in his dissenting opinion in *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388 (1971), that the Exclusionary Rule be done away with or modified. We urge this course of action because of the mounting evidence that the Exclusionary Rule simply does not effectively deter police misconduct and that it places an extremely heavy burden upon society by requiring the release of patently guilty criminals.

The facts of the instant case clearly indicate that the "violation" of respondent's Fourth Amendment rights in the instant case—if a violation there be—was: (1) non-wilful, and (2) insubstantial. Further, the absolute application of the Exclusionary Rule to the search made here will not deter future police conduct in cases in which the safety of the officer is involved; and the current confusion surrounding the law of search and seizure makes it unlikely that an Exclusionary Rule which cannot be understood by police officers can, as a practical matter, be enforced.

For these reasons we urge the Court to consider a modification of the Exclusionary Rule limiting its application to wilful, flagrant, and substantial violations of individual rights through police misconduct.

ARGUMENT.

Amici, in this brief will not reiterate the legal arguments advanced by the United States that the search in the instant case should be sustained, although we are in complete agreement with the position of the United States on this issue and we wish to associate ourself with it. *Amici*, rather, will deal with the two issues in this case which are of critical importance insofar as the effectiveness of law enforcement is concerned: (1) the safety of police officers, and (2) the application of the Exclusionary Rule in the instant case.

I.

The Proven Dangers of Custodial Traffic Arrest Situations Mandate That Courts Should Review Such Cases Realistically So as to Afford the Maximum Protection Possible to Law Enforcement Officers.

A. Custodial Traffic Arrests Present a Clear Danger to Law Enforcement Officers.

The lower court plurality in this case was confronted squarely with the issue of the right of a police officer to make a thorough search, for his own protection, of a traffic offender whom he had, as required by his departmental regulations,[1] taken into custody. That court resolved the issue against the safety of the police officer. It held, in a 5-4 plurality opinion, that a *Terry*-type frisk was the only permissible protective search that an officer could make, pursuant to a custodial traffic arrest, and further held, as a consequence, that a packet of heroin found during a good faith, full field search of the traffic offender was the fruit of a Fourth Amendment violation and therefore inadmissible in evidence.

1. D. C. Metropolitan Police Department General Order No. 3, Series 1959 (April 24, 1959).

We believe that, if it is sustained, this limitation upon the scope of a protective search in cases such as this will, in all likelihood, materially increase the dangers faced by police officers. Accordingly, we urge this Court to reverse the holding of the lower court and further to hold that appellate courts, when reviewing police procedures in which the safety of law enforcement officers is a major factor, should apply realistic standards of judgment, taking into account the actual dangers with which our law enforcement officers are daily faced.

This Court has traditionally been solicitous of the safety of law enforcement officers in their confrontations with the lawless and violent elements of society as is evidenced by its holdings in *Terry* v. *Ohio*, 392 U. S. 1 (1968) and, more recently, in *Adams* v. *Williams*, 407 U. S. 143 (1972), two cases involving stop and frisk procedures in police-suspect confrontations. We contend, as does the government, that the instant case, in which the inherent dangers of a traffic arrest are combined with a situation involving the actual taking into physical custody of the arrestee, justifies the full field search condemned by the court below. We seek, herein, to present this Court with empirical data to support this contention.

Traffic stops are one of the most dangerous aspects of police work. In most such instances an officer is approaching a stopped vehicle with no idea as to whether or not he is going to confront a law abiding citizen who has inadvertently exceeded the speed limit or passed a stop sign, or a dangerous criminal fleeing from, or wanted for, another crime of which the officer making the traffic stop has no knowledge. This lack of knowledge makes the officer extremely vulnerable to a surprise attack from those criminals in the latter category who know very well that they are wanted for other crimes.

This vulnerability on the part of a police officer making a traffic stop can be graphically illustrated by two recent cases:

(1) On October 12, 1972 Michigan State Trooper Steven DeVries stopped a car, apparently for a traffic

violation. The car had been stolen and used to escape from a bank robbery of which Trooper DeVries was unaware because no alert had been sounded. The driver of the car, who had earlier robbed the bank, shot Trooper DeVries to death. The license number of the robber's car was found on the trooper's clip-board. (*Chicago Tribune*, October 13, 1972, p. 5.)

(2) On May 3, 1973, a New Jersey State Policeman was killed by the occupants of a car that he had stopped for a routine traffic check. The occupants were militants, wanted in another state for killing policemen. (*New York Times*, May 3, 1973, p. 1.)

Both of these cases are typical examples of the dangers inherent in traffic stops: the officer is caught unawares by the show of deadly force by the "traffic offender" and the fact that the element of surprise is totally with the "traffic offender" materially increases the danger to the officer.

The dangerous nature of the "routine" traffic stop is amply illustrated by the tragic statistics of officers killed in traffic arrest situations. During the five year period 1968-1972, according to the Uniform Crime Reports of the Federal Bureau of Investigation, law enforcement officers nationwide were murdered in traffic stops as follows:

	Total Murdered	Murdered in Traffic Stops
1968	64	1
1969	86	5
1970	100	9
1971	126	20
1972	112	14

Even more ominous are the figures for the three month period January through March of 1973. In this period 35 officers were murdered, 11 of them in traffic stops, for a ratio of *almost one in three* traffic stop deaths to total deaths.[2] Thus, there can

2. Uniform Crime Reports of the Federal Bureau of Investigation, January through March, 1973.

be no question that law enforcement activity dealing with traffic stops is a truly dangerous activity.[3]

Compounding the danger of situations such as are involved in the instant case is the fact that the officer was required to take the traffic arrestee into custody. This means that for a more or less prolonged period of time the arresting officer will be exposed to the close proximity of the arrestee as well may be other officers, custodial personnel, and other prisoners. The danger to all of these individuals is not imaginary. In the period January, 1968 through March, 1973, 25 law enforcement officers have been killed in the United States while handling, transporting or engaged in the custody of prisoners.[4] Thus, we see in the combination of the traffic stop and the custodial situation the very real dangers faced by law enforcement officers in cases such as the instant one.

Against the background of this information, which establishes beyond doubt the actual danger of custodial traffic arrests, the attitude of the plurality of the lower court towards the safety of police officers warrants examination. The majority comes to the almost unbelievable conclusion that the possibility of injury to a police officer is "remote"[5] and that ". . . [traffic] arrests constitute possibly the safest of all law enforcement activities."[6] We are, frankly, at a loss to understand how an activity, which has claimed the lives of sixty officers in a five year and three month period, can even be called "safe," much less the "safest."

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3. The statistics given above for traffic stops and handling of prisoners deal with homicide only. Statistics on assaults against law enforcement officers in these categories are less readily available; however, Judge Wilkey notes in his dissenting opinion to the plurality opinion below that in the period July, 1970 to June, 1971, 100 police officers sustained injuries in the course of making traffic arrests. 471 F. 2d 1082 (1972) p. 1616 ft. 20.

4. Uniform Crime Reports of the Federal Bureau of Investigation, January 1968 through March, 1973.

5. 471 F. 2d 1082, p. 1097.

6. *Id.* p. 1097.

The plurality below bases its conclusion as to the "safety" of traffic arrests upon the proportionate number of such arrests to the number of officers killed or injured. While the proportion is admittedly small, we submit that this sort of analysis begs the question. Our society has, as its sole defense against lawlessness and violence, the police officer on the street. We require him, by the oath he has taken, to interpose himself between us and the criminal, to confront those engaged in criminal acts and to seek out those who have committed or are about to commit criminal acts. In these circumstances the wanton killing or injuring of *any* law enforcement officer is of major concern to society and when as clear a pattern of danger is established as in the traffic stop situation this danger should not be treated with the insensitivity, based on statistical ratios, which was shown by the plurality below.

The analysis of the lower court plurality that danger to the police officer becomes remote because of the number of *non*-fatal or *non*-injurious contacts made, would, if taken to its logical conclusion, dictate that reviewing courts not concern themselves with the safety of law enforcement officers at all; for obviously the number of enforcement activities in which the officer is engaged on a daily basis will far exceed the number in which he is killed or injured. We emphasize again, however, that this is simply not the point. Once a clear pattern of danger to police officers has been shown we submit that this danger should be a matter of vital concern to reviewing courts and should not be cast aside lightly on the basis that the potential danger only becomes *actual* in a relatively small number of cases, proportionately speaking.

The plurality below, after convincing itself of the remoteness of danger in traffic stop situations, engages in a "balancing" test in which the right of a person who has been arrested and taken into custody for a traffic offense not to be thoroughly searched are weighed against that of the officer to search for his own

protection.[7] We submit that when the danger to police officers is as clear and present as it is in the custodial traffic stop situation and when the invasion of privacy is as minimal as in the case of searching someone *who has already been taken into full custody*, then such a "balancing" test is completely inappropriate. We do not believe that the Fourth Amendment requires such nice distinctions and "balancing" tests between the very real, empirically proven, risks which police officers face in custodial traffic stop situations and the right of privacy of citizens, unless the right involved is so compelling and overwhelming as to mandate a disregard for the officers' safety. There may be such cases, but the instant case is clearly not one of them, for, in the instant case, the expectation of one lawfully arrested not to be fully searched is hardly reasonable and is not sufficiently compelling to offset in any manner the dangers to the officers involved.

The plurality opinion below, as a part of its balancing test concedes that ". . . a thoroughgoing search . . . would offer *total* protection to the officer . . .",[8] but refuses to sanction such a search and, instead, leaves the officer to the "substantial" protection of a *Terry*-type frisk.[9] We do not believe that, in those areas in which a clear danger has been established, this court or any other court should relegate the safety of police officers to that of mere "substantiality." For the policeman on the street who is called upon actually to make the confrontation in a traffic stop (and who is well aware of the statistics of traffic stop fatalities) the picture is far different than it may be to a judge sitting in the isolated safety of a courtroom. The policeman should not have to content himself in the knowledge that a judge has decided that he is 7/10 or 8/10 or 9/10 safe from being killed or injured by one whom he has arrested and taken into custody.

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7. *Id.* p. 1101.
8. *Id.* p. 1100.
9. *Id.* p. 1099.

We do not argue herein that there should be no limitation upon the right of the police to protect themselves through searches for weapons. We would not, for example, ask this Court to sanction random weapons searches based neither upon probable cause or reasonable suspicion. Nor would we ask this Court to sanction, by the admission of evidence seized, the legality of a search incident to traffic arrest which was a mere subterfuge to search for other evidence, but this is clearly not the situation in the instant case. What we do urge is that, at least in cases such as these, where the intrusion is minimal and the countervailing danger real, this court will not limit, and will not permit lower courts to limit, the legal right of law enforcement officers to make searches which are sufficiently thorough to protect them.

B. A Terry-type Frisk Provides Insufficient Protection to Law Enforcement Officers.

We have mentioned herein the difference between the actualities of law enforcement activity which face the policemen on the street on a day to day basis and the unreal and remote view of this same activity which is often taken by an appellate jurist whose exposure to the dangers involved is purely vicarious. The plurality opinion below which talks of the "substantial" protection of police officers embodied in the permitted "frisk" is an excellent example of just such an unreal and abstractionist view of the realities of police work. In this section of our Argument we wish to offer to the Court a number of actual police cases in which a cursory search or "frisk" for weapons, as would be permitted by the plurality, failed to disclose deadly weapons which a thorough search would almost undoubtedly have revealed. Although three of these cases involved crimes other than traffic offenses we are utilizing them to demonstrate to the Court the fact that weapons may often be concealed in such a manner that a frisk will not locate them.

1) On May 16, 1970 Santa Clara County, California, Sheriff's officers had occasion to arrest a suspect on an outstanding warrant for default of bail. A .22 caliber revolver was found in the suspect's boot during a thorough search; however, two prior pat-downs of the boot had failed to reveal the weapon. Source: Mr. Royce Fincher, Police Legal Advisor, San Jose, California Police Department.

2) On August 31, 1968 officers of the Greenfield, California police department stopped a car for speeding and after determining that the car was stolen, arrested the driver, an A. W. O. L. paratrooper. While being booked at the police station the suspect pulled a gun, which had been concealed in the athletic supporter of a bathing suit which he had on under his trousers, and kidnapped a policeman. The officer subsequently escaped and the suspect later surrendered. After his surrender the suspect was able to conceal from the officers yet another pistol in the athletic supporter which he drew and shot himself. Source: *Greenfield California News,* September 4, 1968.

3) On June 25, 1972 a motorist was stopped by Santa Clara California police officers for defective brakes. A name check revealed that there was an outstanding traffic warrant for the motorist. He was taken to jail to post bond on the warrant. Under California law, *People* v. *Superior Court* (Simon), 7 Cal. 3d 186 (1972), only a "frisk" was permissible. The frisk turned up a knife in the suspect's back pocket, but as the officer indicated in his report of the incident: ". . . no exploratory or probing search was further made." It was determined that the suspect was unable to post bail and he was finally booked into the jail. Only then was a .25 caliber automatic found concealed in his crotch. The suspect turned out to be a convicted robber; three months later the same suspect shot and killed a Sunnydale California police officer. Source: Santa Clara California Police Department Offense Report.

4) On April 11, 1971, at about 1:00 a.m. a Washington State Trooper arrested a man for drunken driving. He frisked the arrestee's outer clothing, finding no weapons. While the trooper was transporting the suspect to jail the suspect pulled a pistol from a tightly fitting shoulder

holster which he had concealed in his armpit under a very heavy coat and vest. The suspect took the trooper and a dispatcher hostage, but was finally subdued and apprehended. Source: Washington State Patrol Offense Report.

5) On June 5, 1954, Daytona Beach Police picked up a sixteen year old boy for being a runaway. They frisked the boy but found no weapons. As the boy was being processed into juvenile hall, he produced a gun which had been concealed in a belt worn under his dungarees and shot and killed a juvenile custodial officer. The officer who had originally arrested the runaway stated in his report that he did not see or feel anything while frisking the boy. Source: Daytona Beach, Florida Police Department Offense Reports.

6) On February 13, 1973, in the early morning hours, a Seattle, Washington police officer observed a car standing in the middle of an intersection. The officer approached the car, which appeared to be abandoned, when an individual in the car sat up behind the steering wheel. After questioning the suspect, the officer, believing the car to have been stolen, placed the suspect under arrest. After this arrest the officer frisked the suspect who became combatative during the frisk. The officer then handcuffed the suspect's hands behind his back. Upon receiving confirmation that the car was, in fact, stolen, the officer placed the suspect in the back of his police car to take him to the station. The suspect pulled a gun, apparently hidden under his belt in back and shot at the officer six times until he was finally subdued. Source: Seattle, Washington Police Department Offense Report, February 13, 1973.

7) In Charlotte, North Carolina on June 17, 1971, an individual who had been arrested for stealing a car and had been handcuffed behind his back was able to pull a pistol from his clothing and wound a police officer. The suspect had been frisked but not searched. Source: Office of the Legal Advisor, Charlotte, North Carolina Police Department.

In each of the foregoing cases, weapons, all firearms, which were well concealed inside the suspects' clothing, were not discovered by frisks or cursory searches. We have brought these cases to the Court's attention in order to try to bridge the gap between the theoretical "substantiality" of the safety of officers contained in the lower court opinion and the reality of police work in dealing with dangerous individuals who have gone to considerable pains to conceal their weapons. In each of the cases the arrest was fully custodial and in three of the cases custodial traffic arrests were involved. These cases are, we submit, typical of many in which the "substantial" protection of police officers with which the plurality opinion below credits a frisk or pat-down is, in reality, no protection at all.

Additionally, the last two instances cited above, are cases in which frisks did not discover weapons, which were subsequently pulled by suspects whose hands had been handcuffed behind their backs. These two cases illustrate the fact that criminals, who have been taken into custody and theoretically rendered harmless through the handcuffing process, may nevertheless be extremely dangerous. Again, we emphasize the difference between theory and reality. To one unfamiliar with police work as it actually is, a criminal suspect whose hands have been handcuffed behind his back would seem to be the epitome of helplessness; yet the realities of the situation, illustrated by these two cases, indicate precisely the opposite.

In each of the cases set forth above a thorough search would have revealed the weapon. The plurality opinion below would deny to officers the "total" protection which a thorough search in custodial traffic arrests would provide. We urge this Court to reverse the decision below and to reaffirm the right of law enforcement officers to the maximum legal protection which they can be accorded as they go about their activities in one of the more dangerous areas of their service.

II.

The Exclusionary Rule Should Be Modified to the Extent That Non-Wilful, Insubstantial Violations, Such as Are Involved in This Case, Should Not Be Encompassed by the Rule.

The instant case presents a vehicle by which this Court is again given an opportunity to examine the continued validity and scope of the Exclusionary Rule. This Rule, made a part of our jurisprudence in 1914 for federal proceedings[10] and in 1961 for state proceedings,[11] seeks to deter unlawful police conduct through the suppression of illegally obtained evidence. Of late, the Rule has come in for considerable cirticism, the most telling of which was in the form of a dissenting opinion by Mr. Chief Justice Burger in *Bivens* v. *Six Unknown Named Federal Narcotic Agents*, 403 U. S. 388 (1971).

In this opinion the Chief Justice reviewed the major arguments against the Exclusionary Rule and concluded that the Rule does not accomplish its often-stated purpose of deterring illegal police conduct, does not provide a remedy for those parties aggrieved by illegal searches and seizures against whom criminal proceedings have *not* been brought, and does nothing to punish the wrongdoing police officers.[12] Additionally, he noted, the Rule places a tremendous burden upon society by requiring the freeing of offenders whose factual guilt is patent.

The Chief Justice suggested that a legislative alternative to the Exclusionary Rule be set up whereby the governmental entity for which the errant police officer worked be held liable to the aggrieved party for the officer's illegal acts and that all relevant

10. *Weeks* v. *United States*, 232 U. S. 383 (1914).

11. *Mapp* v. *Ohio*, 367 U. S. 643 (1961).

12. Additional evidence to this effect may be found in recent law review articles. See: Spiotto, Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives. J. Legal Studies, University of Chicago Law School, January 1973, p. 243; and Tonkin, A Need To Modify the Exclusionary Rule, 1973 Virgin Islands Bar Journal, Vol. 4, No. 1, p. 1.

and probative evidence be admissible no matter how it was obtained. Chief Justice Burger then stated that he could not countenance doing away with the Exclusionary Rule *entirely* until proper legislative alternatives were set up to restrain and punish unlawful police conduct; nevertheless he added:

> Independent of the alternative embraced in this dissenting opinion, I believe the time has come to reexamine the *scope* of the Exclusionary Rule and *consider some narrowing of its thrust* so as to eliminate the anomalies it has produced. 403 U. S., at 424. (emphasis supplied.)

Amici herein will not dwell at length upon the arguments which have been raised against the Exclusionary Rule, as these have been raised before this Court in other cases.[13] We believe however, that this case presents an excellent opportunity for this Court to consider narrowing the scope of the Rule as it is applied to the instant case. We believe that, even if this Court should find that the search of Respondent violated the Fourth Amendment, the Exclusionary Rule, for the following reasons, should not be applied to the facts of this case.

1) *This was not a flagrant or wilful violation.* The search of the respondent was made pursuant to a lawful arrest for operating a motor vehicle after revocation of the operator's permit. There is nothing in the record to show that the police officer was acting in bad faith and the United States District Court for the District of Columbia, upon remand from the first *en banc* hearing, specifically found that the search of respondent was proper.[14] Indeed the "full field" search of the respondent was mandated by the Officer's departmental regulations.

The fact that the *en banc* Court of Appeals below split 5 to 4 over the legality of the search is further evidence that the violation was non-wilful. A Fourth Amendment "violation"

13. See e. g. the brief of the State of California and briefs *amicus curiae* (including *amici* herein), in support thereof, in the case of *California* v. *Krivda*, 409 U. S. 33 (1972).

14. See Appendix B to the Petition of the United States for certiorari in the instant case.

by a police officer, which four distinguished federal appellate judges found to be no violation at all, can hardly be classified as "wilful" on the part of the police officer.

Chief Justice Burger in his dissent in *Bivens* noted that there can clearly be two types of "violation" in Exclusionary Rule cases:

> Inadvertent errors of judgment that do not work any grave injustice will inevitably occur under the pressures of police work. These honest mistakes have been treated in the same way as deliberate *Irvine*-type violations of . . . the Fourth Amendment. *Bivens, supra,* at 418.

Amici believe that the "violation" herein is precisely that type of "honest mistake" to which the Chief Justice had reference, and that the Exclusionary Rule should be modified so as to encompass only those flagrant, *Irvine*-type violations in which policemen willfully violate, in a substantial manner, another's rights.

2) *The "violation" in the instant case was not substantial.* In this case the respondent was already in custody pursuant to a lawful arrest, and pursuant to this arrest his freedom was completely restricted. If he could not make bail he would have been locked up. Further, even under the plurality opinion below the arresting officer had a right to "frisk" the respondent, thus the "instrusion" into the respondent's pocket to remove the cigarette package—if intrusion that be—was very minimal. Thus, the "violation" here was clearly unsubstantial.

3) *Suppression of the evidence in the instant case will have little or no deterrent effect on future police activity. Amici* believe with the utmost sincerity that most policemen in this country truly desire to comply with the search and seizure guidelines laid down for them by the courts, legislatures and police administrators. Nevertheless, no police officer in his right mind is going to risk his life or safety in order to be absolutely certain that he has adhered to the letter of those restrictions on his conduct, which restrictions—promulgated, as we have

noted above, by judges whose exposures to the dangers that police men face is solely vicarious—may cause the officer to be killed or injured.

The limitations, imposed by the plurality below upon a policeman's right to protect himself in situations which he knows from experience to be dangerous, are both abstractionist and artificial. It is one thing for a given judge to state that it is enough for a policeman to receive "substantial" rather than *total* protection under the law, but it is quite a different matter for the policeman on the street to forego a thorough search—geared to his total protection—when he feels himself endangered, simply because his protection is limited by the "substantiality" test imposed upon him by judicial fiat.

This is not to say that most, or even many, law enforcement officers will intentionally violate the rules governing their conduct. What it means is that an officer, who is in a situation in which he believes himself endangered by a possibly armed individual, is going to do what he believes necessary to disarm that individual first and then worry about the rules concerning the admissibility of evidence. This being the case, the suppression of evidence in this case will not deter the officer who truly believes that he is in danger, and, because most officers are well aware of the dangers of traffic stops and custodial situations, protective searches will probably be made. If, as in the instant case, contraband, turned up in a good faith protective search, is suppressed, we have the anomalous situation of the Exclusionary Rule being used to "punish" a police officer who was doing no more than attempting to protect himself from attack, while it insulates a violator, who was already under lawful arrest, from the consequences of his possession of contraband found in the protective search. In such a situation any deterrent effect on police officers is lost completely.

4) *The law of search and seizure is in such a state of confusion that it is hardly understandable to police officers.* We

ask this Court to consider the fact that as a practical matter, under the law as it presently exists, the absolute sanctions of the Exclusionary Rule must be applied even though the area of law of its application—search and seizure—is perhaps the most complex in the criminal law, or, for that matter, in any area of the law. For example, the "frisk only" rule promulgated by the plurality for custodial traffic offenses is difficult to comprehend and will be even more difficult for police administrators to explain to the average police officer. It is axiomatic that Fourth Amendment law which cannot be understood cannot be enforced. As we have noted, in the instant case, in the lower court sitting *en banc*, four judges argue that the search was valid while five judges found to the contrary. How is a police administrator, or a police legal advisor or a police rule maker[15] going to be able to explain the niceties of such search and seizure law to a twenty-one year old, high school graduate patrolman who may in one day encounter three or four "borderline" situations involving such questions as the difference between (a) a "search" and a "frisk," (b) a custodial and a non-custodial situation or, (c) a pure traffic stop and a traffic stop involving the possibility of other crimes.

The complexities of current search and seizure law, we submit, warrants a more considerate attitude towards police conduct than is embodied in the absolute application of the Exclusionary Rule as it is interpreted today. Must we really "punish" the twenty-one year old patrolman for falling afoul of search and seizure requirements which cause splits in appellate courts such as are evident in the instant case? At least in those areas in which the law is in such a state of uncertainty, we urge this Court to consider a modification of the Exclusionary Rule.

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15. There is currently, at Arizona State University, Tempe, Arizona, a major project being conducted dealing with departmental rule making as a basis for proper police conduct. The director of this project, which is funded by the Ford Police Foundation, is Professor Gerald Caplan, former General Counsel of the Metropolitan Police Department of the District of Columbia.

This Court, as the final arbiter of Constitutional law in this country, has the authority to revise or modify Constitutional rulings. Our argument in this section can be summed up succinctly: We believe that in those areas of Fourth Amendment law in which a "violation" is found to be (1) non-wilful, (2) unsubstantial, (3) not a deterrent to future police misconduct, and (4) a product of the massive uncertainty as to what is or is not correct in the law of search and seizure, the Exclusionary Rule should not be applied as a shield to protect patently guilty defendants from the consequences of their criminal acts.

In the instant case the truth of the matter is that the respondent *was* in possession of heroin. This fact was discovered by Officer Jenks, not by high-handed, malicious, flagrant or wanton abuse of respondent's rights, but rather in the good faith exercise of his discretion as a police officer, in obedience to his departmental regulations. In these circumstances we believe that the Exclusionary Rule should not be applied absolutely and that the cause of justice would be better served by admitting the evidence against respondent than by excluding it.

CONCLUSION.

Traffic stops are dangerous police activities. The facts prove this. The law enforcement officers of this country are entitled to all of the protection which our courts can give them, commensurate with the protection of fundamental individual rights. The lower court's plurality opinion is insensitive to the very real dangers faced by policemen in custodial traffic arrest situations and it relegates the officers' safety to the "substantial" protection of a frisk rather than the total protection of a full blown search. We urge this Court to overrule this holding and to mandate that in cases such as this, lower courts should take a far more realistic and considerate view of the safety of police officers.

Should this Court uphold the search and seizure ruling of the court below, we urge that the Exclusionary Rule be modified

to the extent that it no longer encompasses non-wilful and insubstantial "violations" such as are presented by the facts of this case. The absolute application of the Exclusionary Rule takes a heavy toll upon society by requiring that the guilty be freed while at the same time it imposes no real sanction on improper police conduct. We believe that if the Rule were modified so that only wilful and substantial violations of Fourth Amendment rights were encompassed that society would benefit immeasurably without doing any fundamental damage or injustice to individual rights.

Respectfully submitted,

FRED E. INBAU, ESQ.
President

ALAN S. GANZ, ESQ.
Secretary-Treasurer

FRANK CARRINGTON, ESQ.
Executive Director
Suite 960
State National Bank Plaza
Evanston, Illinois 60201
Americans for Effective Law Enforcement, Inc.

Of Counsel:

GLEN R. MURPHY, ESQ.
WAYNE W. SCHMIDT, ESQ.
International Association of Chiefs of Police, Inc.
Eleven Firstfield Road
Gaithersburg, Maryland 20760

GEOFFREY M. ALPRIN, ESQ.
General Counsel
Metropolitan Police Department
District of Columbia
Washington, D. C. 20001

SCOTT R. SCHOENFELD, ESQ.
1250 Connecticut Avenue
Washington, D. C. 20036